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The unconstitutionality of act of Congress of...

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THE

UNCONSTITUTIONALITY OF ACT OF CONGRESS

OF FEBRUARY 12, 1873,

DEMONETIZING SILVER.

By HON. THOMAS T. GANTT,
LATE ONE OF THE JUDGES OF THE ST. LOUIS COURT OF APPEALS.

REPRINTED FROM THE SOUTHERN LAW REVIEW.

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ON THE UNCONSTITUTIONALITY OF THE ACT OF CONGRESS OF FEBRUARY 12, 1873.

When this country achieved its independence much was still wanting towards a government capable of securing unison and tranquillity at home and consideration abroad. The several states had an autonomy of their own, but differed among themselves as to the measures demanded by the general welfare, and presented to the eyes of foreign nations a loosely-connected league of thirteen small states, any of which, at pleasure, might withdraw from the association. Such a power could not expect to be greatly respected by a world accustomed to measure nations by their fleets and armies; and divided councils at home threatened those disturbances which can be composed only by referring inevitable disputes to a common arbiter. The respectable, but wholly unsatisfactory, scheme of government furnished by the articles of confederation proved still more unfitted for the trials of peace than for the ordeal of war, and all reflecting men saw that a necessity was laid on them of devising some plan of central authority which, while it secured the exhibition of energetic federal action, should guarantee the rights of the states, or of seeing the failure, in a large measure, of the great work accomplished by the heroes and patriots of the Revolution.

It was not enough to perceive the conditions of the problem. Its practical solution was full of difficulty. But at length

it was completed by the constitution proposed by the convention of 1787. The people ratified it, and for nearly ninety years the wisdom of its founders has been vindicated by the success of the government thus set up. This success has not been unvarying, nor has the approval of the work been unanimous. We have so often fallen below, not only our own ideal, but below the example of our fathers, that at times despondency has been a wide-spread feeling; but the great bulk of rational, candid, and thoughtful men stand in full agreement that the only good government possible for the United States is to be found in the perfecting of the scheme devised in 1788, and that with such marvellous wisdom and good fortune was that scheme devised that the best mode of perfecting it lies in reverting to the informing, animating principles of the original instrument. To the development of these, rather than to the introduction of new ideas, the efforts of statesmen will be most advantageously directed. From the beginning our prosperity and well-being have gone hand in hand with an adherence to those original principles, while every departure from them has been visited by a punishment more or less condign. This purity of the source of the stream of our government is an altogether inestimable advantage.

Of course the most delicate adjustments effected by the constitution were those which assigned to federal and state authority their respective spheres of action; and for the practical and harmonious working of both it was essential that neither should transcend its allotted sphere. Usurpation was hardly anticipated in that early day, but sedulous care was taken that encroachments should not occur through mistake; and for many years none were found to deny that the exercise by the general government of a power not granted by the constitution was of infinitely worse example and consequence than the endurance of any inconvenience resulting from the inability to exercise it. It was received by men of all parties as an obligation of political morality that, if the exercise of some power not given by the constitution should appear to be ever so beneficial, it was nevertheless sternly forbidden by all who recognized their duty to preserve

that constitution inviolate; and that the only course of action under such circumstances which was not criminal was to ask, in the manner prescribed by the constitution itself, for a new power, and in the meantime to abstain religiously from the claim or exercise of any doubtful authority.

Among the powers given by the constitution to Congress was one "to coin money, regulate the value thereof and of foreign coin." This was one of the most important of the powers confided to the central government. The war of independence had wasted our resources, and, in the universal distress which was felt at its close, resort had been had by many of the states to those seductive and pernicious palliatives by which ignorant men so often attempt to furnish cheap money to the community, and to propitiate debtors by the enactment of "relief laws" and legal-tender acts. The disorder thus occasioned was not among the least of the evils which the constitutional convention was called on to remedy, and its provisions were steadily directed to its extirpation. That they were eminently successful is known to all. The government established, among its other titles to the favor of the people, was called a "hard-money government;" and after its establishment, and down to 1862, the only kind of money known to the constitution and the law was the gold or silver coin legalized by Congress.

In the year 1862, the United States being engaged in a civil war of unexampled proportions, the Congress of that day passed an act (February 25, 1862) for the issue of United States notes, declaring them lawful money and making them a legal tender for all debts, public and private, past and future, except that the importers of dutiable goods were declared bound to pay the duties in coin, and the *interest* on the bonds and notes of the United States was declared to be likewise payable in coin. Various other acts of the same nature were passed during the war, but this is the type of them all.

The debt created and remaining unpaid at the end of the war was enormous. At this time, though somewhat reduced, it exceeds $2,500,000,000.

By an act of Congress passed March 18, 1869, the faith of the United States was "solemnly pledged to the payment in coin, or its equivalent, of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligations has expressly provided that the same may be paid in lawful money or other currency than gold and silver."

By section 15 of the act of February 12, 1873, the weight of the silver dollar was raised from 412 1-2 to 420 grains, troy weight, of standard silver. The weights of the half-dollar, quarter-dollar, etc., as fixed by the act of 1853, were scarcely changed. But the silver dollar was declared to be a legal tender only in sums of $5 or less; and by section 14 the gold coins provided by that act were declared a legal tender in all cases and for all sums. I propose to demonstrate the following propositions:

1. That Congress has no power to declare what shall or what shall not be legal tender; that this power belongs to the states alone, and as to them is subject to the restrictions and limitations imposed by the constitution of the United States; that any act of Congress declaring that money, of gold or silver, coined by the United States shall be a legal tender at its face is superfluous and supererogatory; that any act of Congress declaring that such gold or silver coin shall not be a legal tender is repugnant and void; and that any act of Congress declaring anything but gold and silver coin to be legal tender is a usurpation and a nullity.

2. That the sole function of Congress, in respect of money, is to coin it and regulate the value of it and of foreign coin; but that the properties or characteristics of money exist independently of Congress. Congress is directed by the constitution to ascertain and ~~recognize~~ certify those properties and characteristics, but obtains no authority to change or disregard them.

3. That the constitution of the United States recognizes nothing as money but coin of gold or silver.

4. That, as a corollary from what precedes, all acts of Congress declaring anything but gold or silver coin to be 'lawful money' or a 'legal tender,' or declaring coined money of either of these metals not to be 'lawful money' or 'legal tender,' for all purposes for which money can be used, are usurpations of power and merely void.

The several propositions are so blended, and it is so impossible to offer an argument in support of one of them which will not tend to establish the others, that I will not attempt to confine what I have to say to any of them separately. They will stand or fall together.

The proposed discussion necessitates an examination of the legislation of Congress on the subject of money from the beginning. The dates and contents of the several acts are briefly shown in the accompanying note.[1]

[1] By section 9 of the act of April 2, 1792, it was enacted that the eagle, or $10 gold piece, should contain 247 1-2 grains of pure gold, or 270 of standard gold. The half-eagle and quarter-eagle were to be of proportionate weight. The dollar was declared by the same section to be a piece containing 372 1-4 grains of pure silver, or 416 grains of standard silver; quarter-dollars and half-dollars, dimes, etc., to be of proportional weight. By section 11 the proportional value of gold and silver was declared to be as 15 to 1—that is, 15 pounds of pure silver were declared to be equal in value to 1 pound of pure gold. By section 12 standard gold was declared to consist of 11 parts fine gold to 1 part alloy, and standard silver was, by section 13, declared to consist of 1,485 parts pure silver to 179 parts alloy in a total of 1,664 parts. All these coins of gold and silver were declared to be legal tender in all cases.

By section 1 of act of June 28, 1834, the eagle was declared to contain 232 parts of pure gold and 258 parts of standard gold.

By the act of January 18, 1837, the standard of both gold and silver coins was fixed at 900 parts of pure metal to 100 parts alloy, or 9 to 1 in every 10 parts (⅘); and by section 9 the silver dollar is declared to be 412 1-2 grains of standard silver, and the half-dollar, quarter-dollar, dime, and half-dime of proportional weights. These coins were declared to be a legal tender, according to their nominal amounts, for all sums whatever. By section 10 of the same act the weight of the eagle was declared to be 258 grains of standard gold, and the half and quarter-eagle proportionate weights. These, also, were declared to be legal tender at their face. By the 1st section of the act of February 21, 1853, it was provided that the weight of the half-dollar should be 192 grains of standard silver, and the quarter-dollar, dime, and half-dime proportional. By section 2 these coins were declared a legal tender in sums not exceeding $5. By the act of February 2, 1862, United States treasury notes were declared a legal tender in all cases as between man

It is an elementary and axiomatic proposition that Congress possesses no powers which are not granted to it by the constitution of the United States. It has not even any *general grant* of power. Each particular power which the convention proposed to give to it is enumerated, defined, and conferred. In most of the *states* a general grant of "legis-

and man, whether in respect of past or future contracts. By the act of March 18, 1869, it was declared that the faith of the United States was "solemnly pledged to the payment in coin, or its equivalent, of all the obligations of the United States not bearing interest, known as United States notes, and of all the interest-bearing obligations of the United States, except in cases where the law authorizing the issue of any such obligation has expressly provided that the same may be paid in lawful money or other currency than gold and silver."

By section 13 of the act of February 12, 1873, the standard of gold and silver coin was left, as to the *pure* metal in each kind, the same that had been fixed by the act of 1837, but the *alloy* of the gold coin was debased. By section 14 the eagle was declared to be 258 grains of standard gold, half and quarter-eagles and dollar and three-dollar pieces of proportionate weight; and these coins were declared legal tender in all cases. By section 15 the silver coins of the United States were declared to be a trade dollar, a half-dollar or 50-cent piece, a quarter-dollar or 25-cent piece, and a dime or 10-cent piece, and the weight of the trade dollar was to be 420 grains troy, "the weight of the half-dollar shall be twelve grams (grammes) and one-half of a gram (gramme)," the quarter-dollar and dime were declared of proportionate weights, "and these coins shall be a legal tender at their nominal value for any amount not exceeding $5 in any one payment." (By the act of July 28, 1866, the *gram* was declared to be equivalent to 15,432 grains *avoirdupois*.)

By section 16 of the same act the minor coins of the United States were declared to be a 5-cent piece, a 3-cent piece, and a 1-cent piece; "and the alloy for the 5 and 3-cent pieces shall be of copper and nickel, to be composed of three-fourths copper and one-fourth nickel, and the alloy of the 1-cent piece shall be 95 per cent. of copper and 5 per cent. of tin and zinc, in such proportions as shall be determined by the director of the mint," * * * "which coins shall be a legal tender at their nominal value for any amount not exceeding 25 cents in any one payment."

By the act of February 9, 1793, and the act of April 10, 1806, Congress had added to the exercise of its power to "coin money, regulate the value thereof and of foreign coin," the claim of making these foreign coins a "legal tender" in all cases at their established rates. This right was also asserted (and apparently without challenge) in many other acts. The earliest appears to be that of August 4, 1790. But it is sufficiently plain that the assertion of the claim began in the administration of Washington, and the acts need not be cited in detail.

lative power" is made to the general assembly by the state constitution, and then follow, in some state constitutions, the limitations and restrictions upon this general grant. Under such a constitution, of course, the general assembly will possess every legislative power the exercise of which is not forbidden. But, under the constitution of the United States, Congress has no general grant of powers at all; and, each power which is granted being enumerated and defined, it follows that, when any particular power is claimed for Congress, the burden of showing that the claim is rightful rests on him who makes it. He must find it among the enumerated powers given by the constitution to that body. This would have been the necessary construction of that instrument, according to all sound and safe reasoning, if it existed now as it was adopted in 1788; but the 10th article of the amendments takes away all possibility of doubt. "The powers not delegated to the United States by this constitution, nor prohibited by it to the states, are reserved respectively to the states or to the people." Here we are warned, by the words of the constitution itself, to claim nothing but what is plainly given, and unless we can find in the constitution an enumeration of the power claimed among those which are granted, it must be perversity, not logic, which persists in making the claim. A very short examination will satisfy any one that this power is not enumerated among those granted to Congress, and this should be the end of the controversy. But it is claimed that the power is *incidental* to those granted in express terms to Congress respecting money (5th subd. of § 8 of Art. 1), to which there are two sufficient answers: *first*, that all the powers which the constitution proposed to give to Congress respecting money are carefully enumerated, defined, and conferred in and by the passage cited, and the maxim, "*expressum facit cessare tacitum*," excludes the idea of anything more being intended; and, *second*, the constitution itself, in section 10 of Article 1, concedes and declares that the matter of regulating tender belongs to the entity having possession of the general subject of contracts; that the states are this entity; and that it is expedient for the

general good that the powers thus belonging to the states be placed under the restrictions which that 10th section prescribes. It would seem impossible to deny that this was the view of the framers of the constitution, plainly deducible from their own words, unless the contestant is prepared to say that the states would not have any power to do any of the things prohibited by that section if the prohibition were absent, which would amount to saying that the prohibition is wholly unmeaning, and, moreover, would contradict what all men know. History tells us that, in the interval between 1776 and 1787, many of the states *did* make many things besides gold and silver coin a tender for the payment of debts. The mischief ensuing was by no means one of the least of those that led to the meeting of the constitutional convention. That body found the states in the actual possession and most pernicious exercise of this baleful power, and, not attempting to take it away entirely, imposed limitations upon its exercise which, while they recognized its existence, took away its capacity for abuse. In the plainest language the constitution says: "The states, which possess jurisdiction of the matter of tender of whatsoever in payment of debts, shall henceforth be subject to this limitation: they shall make *gold and silver* coin *such tender*, and *nothing else*."

While no accurate thinker will admit that a general grant of "*legislative* power" to the general assembly of a state sanctions the passage of *special acts* (so called) which, instead of furnishing a general rule for a *class* of cases, altogether transcend the sphere of legislation and attempt to decide a particular *case* in flagrant violation of established principles, it is believed that no one will deny that under such a general grant of power the general assembly has control of the whole domain of contracts. What formalities and ceremonials shall be required in contracts of a particular kind; what contracts shall be declared unlawful; in what manner contracts may be discharged; in what manner their performance may be enforced; these and many other matters connected with the making, validity, and enforcement of contracts undeniably

belong to the general law-making power. As the enforcement of any contract may lead to a judgment for a money debt, and as the performance of a large class of contracts consists in the payment of money, the manner in which payment shall be made may fitly be the subject of legislation. Suppose A owes B $10,000. B may be a judge, hastening to the court-house to take his seat on the bench; or a physician obeying a call to a sick bed; or he may be about to close his house for the night and retire with his family to repose. For A, accompanied by several porters, to accost him in the street, dismiss the porters, and tender him the bags containing the coin, or for A to make an ostentatious delivery of this coin to him after the close of banking hours in the evening, so as to expose him to the enterprise of house-breakers, is surely such behavior as may be corrected by statutory provision, if the unwritten law does not furnish a sufficient protection. This unwritten law, if it exists, is no part of the federal constitution, but belongs to the jurisprudence of the state of which both A and B are citizens; and it follows that, whether such conduct be regulated by written or unwritten law, it is by the state that the remedy is applied. Again, if judgment be given that the debtor shall pay the creditor a sum of money, the mode of enforcing this sentence unquestionably rests with the state the courts of which pronounce it. Whether the real or personal property of the debtor shall be seized and sold in satisfaction of the debt; if so, then whether unreservedly or with large or small reservations; whether, in default of payment, the person of the debtor shall be liable to arrest—all these things are clearly of state cognizance. I am ashamed to insist upon points so plain. Every one knows that in the times immediately preceding the adoption of the federal constitution there was abundant example of state legislation whereby a creditor, having a judgment for $1,000, was obliged to declare it satisfied if his debtor delivered to him (*e. g.*) a certain number of pounds of tobacco, or a proper number of acres of unproductive land, at a valuation to be fixed by a jury of debtors. The remedy for all this lay, not in altogether taking away the

right of the states to legislate on the subject of contracts, or of tender in satisfaction of a contract (this would have been a blow at their autonomy which would not have received the vote of the delegation of a single state in the convention which framed the constitution), but in forbidding an abuse of power in connection with this general subject which every fair-minded and intelligent man saw and lamented. All such abuse comes, *at best*, from sickly sentimentalism and muddled thought; nine times in ten it is powerfully aided by downright dishonesty. But experience had shown that this combination was *habitually* too strong for justice, and there was nothing for it but to forbid, as an illegal thing—as something opposed to the organic law—any such vagaries for the future. This, and nothing more, was the extent of the prohibition. The remedy was nicely proportioned to the mischief. There was no thought of transferring to the general government a power at that time lodged with and exercised by the states; but only of so limiting that power as to make the future exercise of it by the states incapable of working injustice.

To show the sense of the convention as to the propriety or the possibility of giving to the federal government power to make anything whatever a legal tender, see the debate on the adoption of the clause reported by the committee (§ 8 of Art. 1, 2d subd.): "To borrow money and emit bills on the credit of the United States." I will not encumber this article with what every one can read in Elliott's Debates, pp. 434–5.

It must be admitted that if Congress has the power to declare *what* shall be legal tender, the states do not possess it. The power of determining what may be determined in more ways than one can never be reposed in two independent bodies. One must have it to the exclusion of the other, for the possession of it by one is incompatible with the like possession of it by any different body. It cannot be necessary to illustrate this. But if Congress has the power claimed at all, it has it *without limitation*. If Congress can make gold or silver coin a legal tender *by any independent legislation*, there is nothing to prevent its making iron or copper coin, pieces of leather, or bits of paper, shells, or oak leaves, or

what not, legal tender also. This I take to be incontrovertibly true. I have denied to Congress the possession of the power at all, and have successfully defied any advocate of it to point to the grant under which alone it can be fairly claimed, according to any rule of construction with which I am familiar. But if it can be claimed as a right inherent in the very nature of the government established by the constitution, then, clearly, there is no limitation upon the exercise of the right. There *is* a limitation, but it applies to the states alone. In the same section in which it occurs there is an absolute prohibition on the *states* to "coin money," "grant letters of marque and reprisal," "pass any bill of attainder," etc. Now, of these powers some are given to Congress and some prohibited to Congress, as well as to the states. But nowhere in the constitution is there a prohibition to Congress of jurisdiction over legal tender, and nowhere is there any limitation of any existing jurisdiction. If, then, Congress has the power *at all*, it has it without reserve, and can make WHATEVER IT WILL *receivable in satisfaction of any debt*. This is the necessary conclusion, and surely it is monstrous enough to make any one in his senses distrustful of the premises which lead to it.

But it is said that "it *must* be that Congress possesses this power, for it has exercised it from the beginning without challenge. The men who made the constitution put this construction on it; Washington, the president of the convention, approved, as president of the United States, an act of Congress—nay, several acts—asserting and exercising the power; Madison, Hamilton, and a host of others who were members of the convention, participated in these acts. In 1834 and in 1837, when Jackson was president, and Benton, Silas Wright, Calhoun, and Webster were senators, acts were passed of the same character. This is the *cotemporanea expositio* which has so often been declared to be of overwhelming strength in the eye of the law; and, after so long a line of precedents, the question must be treated as absolutely settled by all men who believe in stability and fixedness." This is the argument in favor of the power, so far as

it rests upon authority. I admit that it is of very great plausibility. It is by far the best argument of which the claim admits—indeed, I consider it the *only* one—and I have endeavored to state it as strongly as possible. If it can be shown that Madison, or Benton, or Silas Wright, or Calhoun, or Webster ever advocated or admitted this power, I am ready to concede that authority can go no further. But I deny that any of these men ever did any such thing.

My position is that, in all the legislation before 1853, what fell from Congress on this subject is simply a declaration of a consequence, the drawing of an inference—*not* the addition of a quality to the subject-matter which, up to that moment and except for that declaration, it did not possess. If I make this appear I shall have broken all the force of the argument from authority. It was for the purpose of the full consideration of this question that so full a quotation was made from the various acts of Congress from 1792 to 1873. In examining the first it is well, however, to cite more exactly the words of its 16th section: "That all the *gold and silver* coins which shall have been struck at and issued from the said mint shall be a lawful tender in all payments whatsoever." What was Congress proposing to do in this act? Manifestly, in fulfilment of one of its most pressing duties and the execution of one of its clearest powers, "to coin money and regulate the value thereof," it established a mint; ordered the coining of several pieces of gold, silver, and copper, the standard of the first two metals being fixed; declared the weight of the eagle, the half-eagle, the dollar, etc., and directed that these pieces thus coined should be issued with an authentic certificate of their respective denominations or values. Thus, a certain piece of standard gold would be issued, with a certificate, which no one in the United States could gainsay, that it was of the required fineness, and contained enough gold of that fineness to be worth $10. So of the half-eagle and the quarter-eagle, and so of the silver dollar and its submultiples or divisions. Now, let us imagine A to owe B $1,000. He takes either 10,000 dimes, or 4,000 quarter-dollars, or 2,000 half-dollars, or 1,000 dollar pieces,

or 400 quarter-eagles, or 200 half-eagles, or 100 eagles, and tenders any of them (making his own choice of any lot named) to his creditor. Will he require the aid of any act of Congress, or of any state, to legalize and validate this tender and entitle himself, in consideration of it, to a discharge from his obligation to pay $1,000? Clearly not. He owes his creditor—what? One thousand dollars. What is a dollar? A piece of money, the fineness and weight of which Congress has the right to determine. Thereupon he takes 1,000 pieces of money, thus determined, and tenders them to his creditor; he owes $1,000—that is, he is bound to pay $1,000—to him, and he *does* pay $1,000 to him. He pays or tenders the *identical* thing he was bound to pay or tender. No act of grace or permission is needed to establish a truism—to declare that performance is performance. If A owes B 100 horses, and an attempt be made to discharge the obligation on the ground that so many bushels of wheat or so many pounds of tobacco shall be the legal equivalent of each horse, at the option of the debtor, undoubtedly the sanction of an overruling power will be required to give effect to such a departure from the terms of the contract; a power greater than any state of this Union can exert, and equally beyond the powers of the general government or Congress. But it is equally plain that no act of legislation is needed to enable A to satisfy B, in law and in morals, by delivering to him what his contract specifically calls for, viz., 100 horses. It follows that the 16th section of the act of April 2, 1792, was not of any legal consequence; the act remained, after its addition, precisely what it was before it was added. It was mere surplusage. In all the various acts regulating the value of foreign coin, *and* enacting that a piece of gold or silver declared by Congress to be legally equivalent to so many dollars, or parts of dollars, should be a legal tender for so many dollars or parts of dollars, the same ineffectual declaration was repeated. It follows, then, that the wholly unnecessary declaration contained in the 16th section of the act of 1792 (limited, as it carefully is, to the *gold* and *silver* coins therein mentioned and provided for)

did not in any degree add to or detract from what the act would have imported had that section been omitted. Was that section, therefore, harmless? As an act of legislation it was harmless, because ineffectual; as a precedent it was full of mischief, and furnishes one in addition to the myriad other proofs of the fallacy of the maxim, "*plus* non *nocet.*"

It would be much more correct to say, "*plus valde nocet.*" Like an *obiter dictum*, it is almost always prolific of future trouble. It does no good to the matter in hand, and no harm either, for, by hypothesis, it is irrelevant, but it is full of possibilities for future mischief. As to the explanation of this redundant section I have nothing to offer but conjecture. Every one familiar with the practice of legislative bodies knows how troublesome is the persistence with which some well-meaning, but vain and fidgety, members strive to make "*their mark*" on a measure; how fondly they seek to incorporate an amendment to which they can point as their own. The old jest of the individual who moved to strike out *twenty-four* and insert "four and twenty" illustrates this quality. But some of the sentences which are generally received as carefully condensed legal propositions are curious examples of redundancy and vagueness; and any one who has attempted, on a fitting occasion, to prune the redundancy or remove the vagueness will be able to testify to the difficulty, perhaps the impossibility, of succeeding in the effort.[2] There

[2] Quite recently, in a constitutional convention, occurred two striking instances of this nature. The old constitution contained in its bill of rights, among other provisions, the following: "No *ex post facto* law, or law impairing the obligation of contracts, or retrospective in its operation, or making an irrevocable grant of special privileges or immunities, shall be passed by the general assembly." In the new draft it was proposed by the committee to make the corresponding clause read thus: "No law retrospective in its operation, or making an irrevocable grant, etc., shall be passed by the general assembly." But it was vainly urged that the latter was quite as comprehensive as the former proposition. By a large majority the redundant expressions were reinstated. The constitution of the same state had from the earliest times contained a declaration that "all persons shall be bailable by sufficient sureties, except for capital offences where the proof is manifest or the presumption great." A recent convention, by its committee, proposed to substitute, "all persons shall be bailable by sufficient sureties, except on charges for capital offences where the presumption *of guilt* is great." But the proposal raised a storm. It was resisted as an attempt to improve upon the phraseology of Thomas Jefferson and Nathan Dane, and this was pronounced to be almost blasphemous. It was to no purpose that the worshippers of these great men were asked the *meaning* of the words as they originally stood, and whether the ellipsis should be supplied by interpolating "of guilt" or "of innocence," and it was just as little effectual to enquire whether bail would not be forbidden, *a fortiori*, when the proof was manifest, if it were denied when the presumption was great.

is a great impatience in the average deliberative body of what are termed "*verbal niceties;*" a great disposition to retain any "explanatory" clause; and a tendency, in the interest of a "quiet life" on the part of a leading member, to admit an amendment which is not palpably hurtful. I will not stop to enquire into the history of the passage of the act of 1792. But if it had been reported without section 16, and that section had been proposed as an amendment, we may readily imagine that when the demonstration had been made that it was unnecessary, seeing that the same thing resulted irresistibly from what preceded, the reply may have been: "The only objection to the proposed section is that it gives an unmistakable expression of what is already a plain inference. Now, I wish the act to be so plain, so clear on its face, as not to leave any occasion to resort to inference." Under the influence of such suggestions we may well understand that this superfluous section first gained a place on the statute book. Once there, its continuance or repetition in all the acts of similar tenor down to 1853 may readily be understood. In none of these did its insertion add to or take from the effect of the act.

"But," it is urged, "of many of these acts, and notably of those of 1834 and 1837, such men as Webster, Benton, Calhoun, and Silas Wright, admitted to be men of great intellect and thorough acquaintance with the subject of the currency, under the constitution of the United States, were actively engaged in framing the language employed by Congress in legislating on this subject. All of these men were deeply interested in the question; all of them took an active part in the legislation, and nothing can be imputed to negligence." I am not disposed to dispute the force of this objection. It

certainly is extraordinary that none of these penetrating, discerning men perceived the danger lurking in this assertion of power; and, as far as I am advised, I do not think it possible to deny that either they did overlook the assertion—did not perceive that it was made—or, seeing that it *was* made, acquiesced in it. If, however, it can be shown, not inferentially, but in the plainest manner, that each one of these great men over and over again, in the strongest, most unequivocal language, denied that Congress could make anything but "the money of the constitution," "gold and silver coin," a legal tender, it will follow irresistibly that they denied the power of Congress to do anything in respect of money but to "*coin*" it and "*regulate its value*;" and that they only assented to the employment of the legal tender declaration in the sense of drawing an inference and stating a consequence—not at all in the sense of superadding to the gold and silver coin a quality which it did not previously possess. Now, space would be wasted in citing passages from the public utterances of all these men—Webster, Benton, Calhoun, and Wright—to prove that, one and all, they denied the power of Congress to make anything but gold and silver coin, *money* in any legal sense. Nothing would be easier than to make the citations, and nothing, I conceive, could be more unnecessary. Every well-informed man knows the fact. It follows that these eminent men never supposed that any word or act of theirs could be quoted in support of the proposition that Congress possessed any cognizance of the subject of tender, for we have already seen that, if Congress really possesses *any* control over this matter, its power is absolutely unlimited.

All these men had passed away from the public stage in February, 1853. Three of them were in their graves; the fourth was in retirement. In February, 1853, occurred the first mischievous exercise of the power asserted so often and so harmlessly before. A glance at the history of 1834, 1837, and 1853 will not be uninstructive. Prior to 1834 there was practically no circulation of American gold in this country. A few eagles, half-eagles, and quarter-eagles had been struck under the act of 1792, but those which did not go to the

melting-pot were preserved as curiosities. In fact, the eagle, or $10 piece, of 1792, containing 247 1-2 grains of pure gold, was much more than ten times as valuable in the markets of the world as the Mexican or United States dollar, containing 372 1-4 grains of pure silver. The proportion established by section 11 of that act (15 to 1) was unjust to gold. The consequence was that prior to 1834 our only coins in general circulation were of silver and copper. The foreign gold coins which occasionally found their way to this country were too insignificant in number and value to be noted as exceptions.

To remedy this condition of things, Congress, in 1834, passed an act declaring the eagle to contain 258 grains of standard gold and 232 parts of fine gold. Nothing was, in terms, said about the standard, but the necessary effect of the act was to lower it. The eagle thereafter contained 15 1-2 grains of pure gold less than the old eagle of 1792. It was (very humorously) declared by this act that these old eagles should continue to be legal tender for their face.

In 1837 the standard of both gold and silver was changed to what it now is. In the case of both metals it was made 9 parts pure metal and 1 part alloy in every 10. The eagle was made to contain 258 grains of standard gold (or 232 2-10 of pure gold). The silver dollar was made to contain 412 5-10 grains of standard (or 371 1-4 grains of pure) silver. The proportion of value between the two metals was not expressly declared, but was thus fixed at very nearly 16 to 1; in fact, respect being had to the pure metals only, it was fully 16 to 1.

The act of 1792 had banished the gold coinage; that of 1837 banished the coinage of silver. It turned out that $10 of silver were at that time, in the markets of the world, worth more than the gold eagle of 1837, and, of course, gold rapidly filled the channels of circulation, except where *it* was banished by bank notes. Silver became scarce, and the resulting inconvenience was seriously felt. Accidental causes aggravated this condition of things. The Ural mountains in Russia, as well as California and Australia, proved to be

large producers of gold, and, no corresponding increase of silver taking place (the mines of Mexico and Peru remained unworked, in great part), it was necessary to readjust the balance of 1837. This Congress attempted, very unskilfully and usurpingly, in 1853. By that act, the *dollar* remaining at 412 1-2 grains, the half-dollar was declared to be 192 grains in weight instead of 206 1-4. The smaller fractions of the dollar were diminished proportionally, and this violation of the laws of arithmetic was balanced by a violation of the federal constitution and a repudiation of its own money. It was declared that this silver coinage should be a legal tender only in sums of $5 and less.

Undoubtedly the Beast here appears—horns, tail, and hoofs. But we had already "lost the breed of noble bloods." Great men had become scarce in Congress, or altogether absent from it, and the time was drawing nigh when a senator, the chairman of an important committee, was able to proclaim, and almost to boast, his ignorance of the distinction between a tariff of protection and a tariff of revenue. This precedent of 1853 may go for what it is worth. For my part, I believe that the actors in it are well entitled to the excuse invoked for those who "knew not what they did."

At this point I may be asked whether these discredited half-dollars, quarter-dollars, etc., can be made by the states a legal tender for all sums? Can any state declare as law that A, owing B $100, can acquit himself of the debt by paying to B 200 half-dollars, so called, of the coinage of 1853? My answer is that no state can do this, and the reason for this conclusion is that these pieces are *not* half-dollars. When Congress declared the dollar to consist of 412 1-2 grains of standard silver, and the half-dollar to contain only 192 grains, it asserted, to the extent of its competency, that 412.5 was equal to 192 x 2, or 384. In other words, it attempted, of course unsuccessfully, to repeal the laws of number, and, in the attempt, realized an absurdity. The states, by seeking to found legislation upon this absurdity, will realize the same results. But if Congress, in 1853, had declared the silver dollar to contain 384 grains of standard silver, and no more, then I say that all dollars coined under that act, and all half-dollars *arithmetically* proportioned to the weight of the dollar, might be made a legal tender by the states, any declaration of Congress to the contrary notwithstanding. I pass over the section making 3-cent pieces a legal tender in limited amounts. The same observations apply; and now, too, the coin is debased as well as lightened. Congress is on the downward road, and moving with accelerated velocity. It seems, however, to have erred mainly through heedlessness and ignorance. In February, 1862, occurred the first *conscious* usurpation of the power to make anything but gold and silver coin a legal tender—that is, to legislate on the subject *at all;* for, unreasoning and ignorant as was the Congress of that day, it can hardly be supposed not to have perceived that the only question was: "Had it cognizance of legal tender at all?" Any one possessed of discernment could hardly have failed to see that if it had the power in any measure it had it without reserve; that if the legislation of 1853 was warranted, that of 1862 was above challenge.

This profligate and most stupid act, which more than doubled our debt and involved the whole country in that delirium under which gaming was substituted for regular industry and speculation for business, is the plain source of all the unhealthy excitement, followed by the unhealthy depression, which have marked the last fifteen years. It would be a digression to pursue this reflection. It is no answer, however, to say that other countries, which have not been cursed with legal-tender acts and paper currency, are no better off, commercially, at this moment than ourselves. When, until these last disastrous years, were Americans forced to take comfort by comparing their lot with that of other people? During all periods before 1860 our prosperity was exceptional—a contrast to the condition of mankind in less favored lands.

We now come to the act of 1873. Before considering it I desire to say that the act of March 18, 1869, how-

ever it may have been intended, and however it was executed, is in its terms liable to no censure except on one point, which has, I think, escaped notice up to this time.[3] It simply declares the promise of the United States to pay a given number of dollars to signify a promise to pay so many pieces of coin—not paper, or what was so falsely called "lawful money," but coin of the precious metals. At the date of its passage, be it remembered, the dollar of 412 1-2 grains of standard silver was a legal tender in all cases, even according to the language of the acts of Congress. So far as the "United States notes" were promissory notes, issued by the government, they were a legitimate, though an unwise, mode of borrowing money. Their issue was, thus far, an exercise of an admitted power. It was when they were declared to be *money itself* that the absurdity and want of principle of the statesmen of that day became manifest. The act of March 18, 1869, declared that these United States notes, not bearing interest, should be paid in coin; and in respect of these, which, if *any* discrimination were allowable, should certainly have been redeemed out of the *first* money which the United States had, or could raise, we have seen all care forgotten for more than eight years, during which they have fluctuated in value from 60 to 95 cents in the dollar. Only in the last twelve months has an attempt been made to redeem part of them by the repudiated silver coinage of 1873, which in this respect is, as to the fractions of a dollar, nearly a reproduction of the act of 1853. More than 380,000,000 of these United States notes, which the government has

[3] I have said there was one particular in which the act of March, 18, 1869, was liable to censure. Like most of the acts of Congress of late years, it betrays great want of reflection and care. It declared that the non-interest-bearing United States notes should be payable in coin; and, also, the interest-bearing bonds and notes of the United States, except where the law authorizing their issue had declared them payable in "lawful money"—meaning what are known as greenbacks. But these last had been, by the same section, declared payable in coin, so that the only effect of this exception was to permit the United States, when one of these bonds was presented for payment, to pay it in paper on which the holder was authorized immediately to demand coin. Was this idle ceremony present to the minds of the concocters of this act?

forced the people to receive as money during all this period of fifteen years, while the value of them has varied from 38 to 95 cents in the dollar, and on which large sum *thus borrowed from the people by a forced loan* not a cent of interest has been paid, or is payable, are now outstanding, and are held at home. By the acts of the government it has been practically declared that the discredited silver coinage—the coinage which, on its face, sets the laws of arithmetic at defiance—is quite good enough, without a cent of interest, for the large class of public creditors who hold these notes. *They* received all these promises to pay at par, and were forced so to receive them. There is another class of public creditors consisting of the holders of the interest-bearing bonds of the United States. Many of these were purchased by the holder at 38 cents in the dollar. No one was compelled to take them at all. On these, from the date of their issue, interest, varying from 6 to 4 1-2 per cent. on their face, has been paid in coin, while the actual interest on the sum paid for them was sometimes more than 16 per cent.; and no one able to weigh testimony can doubt that the act of March 18, 1869, was devised and passed with an eye single to the interests of this class of creditors. Its operation was at once, as well as enormously and permanently, to enhance the market value of our interest-bearing bonds, while it is notorious that, in the very year of its passage, the market value of the United States notes bearing no interest reached a point of depression to match which we must go back to the dark times when it was yet uncertain whether we would be a united people.

Nevertheless, I repeat that the bondholder was fairly entitled to the declaration contained in the act of March 18, 1869. He held our promise to pay so many dollars and so much interest. A dollar *ex vi termini* means, and always meant, coined gold or silver. It has always meant this, from the foundations of our government, in morals and in law. So that the bondholder, though he may have purchased our obligations at 38 cents in the dollar or less, was well warranted in claiming the fulfilment of our promise to pay so

many dollars, principal as well as interest, according to the tenor of the bond. When the price he paid for the security was smallest, the prospect of payment seemed most precarious. He took the risk, and is fairly, legally, morally entitled to the advantage he won by our success in suppressing the rebellion. On this point I think there can be no honest doubt. Moreover, I consider the act of March 18, 1869, to be no enactment at all; no creation of new rights; no introduction of new principles. It was merely a declaration of existing law. It declared the bondholder to be payable in coin; and nothing short of that was true of any obligation to pay a dollar, or many dollars. But what was "coin" as then known to the law? Silver dollars, gold dollars, three-dollar gold pieces, quarter-eagles, half-eagles, eagles, and double-eagles. All these constituted the coin of the United States; and each of these pieces was a legal tender according to its face, and in all cases, no less by its own nature than by the superfluous declaration of Congress to that effect. Under these circumstances suppose A to have been bound, in 1870, by an obligation maturing in 1875, to pay B $1,000 in coin; what is the privilege of A if the one or the other metal should depreciate in the market? Can it be different from what it would have been if the obligation had matured before 1873? In each case the debtor, being held to pay only coin, has the option of gold or silver coin. At all times after 1834 and before 1853 he would gain by paying in gold pieces. About 1870, and since, he would gain by paying in silver dollars. He clearly has the option, and even the authors of the act of February 12, 1873, admit that it was his, unless by that act it was taken away. The question is: Did Congress succeed by that act in thus taking it away? That the attempt was made is undeniable. The intention of the framers of the act is manifest. Silver, from various causes—partly by its repudiation in Europe and partly by its largely increased production in the United States—having depreciated in value, one of the contingencies attending the investment of the bondholder had turned to his disadvantage. We have seen that two

other and most vital contingencies had resulted in his favor. Of these he had received, as he was justly entitled to receive, the full benefit. Another contingency threatened loss to him, and straightway his friends in Congress were anxiously and industriously devising means to save him from loss; which, of course, could be effected only by placing on the other party to the contract the loss that fortune had, for once, assigned to the bondholder. The case was very plain. The bondholder had entered upon a speculation when he took our bonds. If we failed to suppress the rebellion he *might* be unable to collect principal or interest of the bonds he bought. If it should be suppressed, however, he would have an excellent security for his money, and an enormous interest on his investment; in some cases exceeding 16 per cent. per annum, to say nothing of a nearly threefold return of the principal. These were the chances which *he* contemplated and which *we* contemplated. Already the principal event had been determined in his favor, and he had reaped the full benefit of it. It was admitted, as justice required, that the bonds were payable, of right, *in coin;* and, the rebellion having been effectually suppressed, our ability to pay was no longer a question. The bondholder had, then, made a bargain which turned out immensely lucrative. This, of course, was no reason for depriving him of any of his advantages. Governments, on the other hand, have nothing to do with sentimentalism. In dealing with the public creditor, there is no place for liberality. Even-handed justice and perfect good faith he is entitled to, but to nothing more. It is plain that there was nothing in the condition of the parties (the people and the bondholder) to suggest indulgence or favor to the creditor. Thus far he had gained beyond all sober expectation, and even beyond his wildest dreams.[4] The

[4] The full measure of the bondholder's profits is, I think, hardly understood. He bought mostly in 1864. During that year the United States paper dollar was, on an average, worth less than 50 cents in coin. During a good part of the year $265 in paper would buy only $100 in gold. *Then* the paper dollar was worth nearly 38 cents. For a short time it was worth less than 35 cents. This was when $100 coin would buy $287 in paper. By investments, when the paper dollar was worth 50 cents in coin, the capitalist

other party—that is, the public or the people—weighed down by a wasting war, an enormous debt, and all the disorders consequent upon revolution, was painfully exerting itself to bear a load of taxation which a few years before, and when our strength was unbroken, would have been thought intolerable. *In uprightly doing strict justice by the act of March, 1869, we had done more in behalf of the creditor than any government had ever, in like circumstances, done before.* Indeed, there were many of our own people who thought (erroneously, as it seems to me) that *more than* justice had been done; that liberality and favor were at the bottom of the measure of 1869; and that there was room to impugn the motives of those who promoted it. All this I condemn. The measure was right in itself, so far as the bondholder was concerned. If it can be shown that any member of Congress took a bribe for doing his duty, he is a dishonored scoundrel. But, until evidence of that kind is produced, no one should be aspersed for merely doing his duty.

By one of the accidents, the contingencies, to which all human affairs are subject, one of the precious metals, which had from the beginning been coined into, and known as, money by all nations, ancient and modern, heathen and christian, civilized and uncivilized, had become, in 1871–2–3, unexpectedly abundant. Not only was the demand for it greatly lessened, but its production was largely increased. What was more, its increased production was traceable to mines situated in our own land and worked by our own people. The onerous obligations which

realized 12 per cent. interest, and when the bond was redeemed he doubled his principal. Investments made when paper was lowest yielded the capitalist 17 per cent. interest, and trebled his capital when the bond was redeemed. Now, I repeat it, the capitalist is entitled to all these benefits. He made, as it turned out, a capital bargain; but there was an element of risk about it which should not be forgotten. But to give to him, in addition to all these advantages, *a bonus* of from 5 to 10 per cent. on the double or treble of the capital he invested, and to denounce as inflationists and repudiators (they might as well be termed burglars or smugglers) all who protest against this spoliation of the people, can be accounted for only by supposing that those who use this language are fools, or that they believe those who hear it to be so.

had strained our resources were materially lightened. This alleviation was doubly welcome—welcome for the relief it gave, and, perhaps, still more welcome for the *imagination* of the relief. Every one knows how sensitive are the perceptions of the commercial world. At present there is, and for more than nine years there had been, from the fluctuations in value of the currency, a want of confidence in the success of any enterprise involving the use of money. This feeling had been very instrumental in producing what all men dreaded, and was still more potent in paralyzing effort and preventing the attempt to embark in any business. All who can remember the last nine years can fix the commencement of the reaction following the mad revel induced by the flood of irredeemable paper currency, and the progressive severity of the stress which this reaction laid on the whole commercial world; and every one knows with what anxiety all persons in debt awaited the final shock of a complete return to specie payments. At this time, as I have said, causes were in operation which promised a material mitigation of, if not entire relief from, this dreaded shock. The Franco-German war ended with the exaction from France, by Germany, of an enormous sum of money, and a determination on the part of Germany to put aside the use of silver money. This was by far the most important factor in depressing the value of silver. Its effect was at once foreseen by foreign capitalists and by holders of our bonds at home and abroad. And what is certain is that, simultaneously with this perception of the fact by these classes, a movement was made by men entrusted with the duty of representing the public interests in Congress, *to subordinate those interests to the demands and profits of capitalists who had already reaped such inordinate gains from the purchase of our securities.* A bill was introduced into the House of Representatives by Mr. Hooper, of Massachusetts, which was debated and practically settled in the first session of the Congress which met on the first Monday of December, 1871, though it did not finally pass until the 12th of February, 1873. The effect of this act (assuming that Congress had power to pass it) was to take

away from the people the option of paying its debts in that one of the two kinds of coin which was admittedly legal tender on the 11th of February, 1873, and in which altered circumstances made it comparatively easy to pay its obligations, and to impose on them a burden which they had never assumed, nor intended to assume. It involved an enormous increase of the public debt; an increase which every capitalist knew was certain to be more apparent in a few months than it was in the beginning of 1873, by the inevitable development and unfolding of causes then in full operation, but not visible to the general eye; and it deprived the debtor, both public and private, of the immense benefit which would have been given by the anticipation of the relief certain to flow from this improved condition of his relations to the public and private creditor. It also removed to an indefinite distance the prospect of a return to specie payments, and added new terrors to that prospect. In 1872 any one owing a debt of $1,000, payable in coin in 1876, might have made his arrangements for collecting 1,000 silver dollars, each weighing 412 1-2 grains of standard silver, and discharging his obligation therewith. But after the 12th of February, 1873, not only was the weight of the silver dollar increased nearly 2 per cent., but even with this heavier and more valuable dollar he was disabled from paying his debt; and he was told, in a language which became quite intelligible as time wore on, that he must pay in gold, worth more than 10 per cent. premium, the promise he had made to pay in silver coin. This was a sad, oppressive, and unjust sentence on this debtor, but he was not the only person crushed to the earth by the edict. The operation of the repudiation of silver in England and Germany, and the increased production of that metal in the United States, and its repudiation here also, actually brought the price of the silver dollar of 412 1-2 grains below that of the United States note promising to pay one dollar. For the first time since 1862 this cheat, which was falsely called "lawful money" when it was first forced on the acceptance of the people, and which for more than twelve years had fluctuated in value so

ruinously—which at one time was worth less than 35 per cent. of its face—became worth 92 cents in the dollar, while the silver coin of 412 1-2 grains was worth only 91 cents. At this time it had actually occurred that, almost or altogether unconsciously, we bridged the chasm which had separated us from a specie currency. Specie payments, if not resumed, were on the eve of resumption, and nothing but an artificial obstacle to that resumption could prevent its accomplishment. No one can dispute that every requirement of good faith and scrupulous justice would have been met by the payment to the public, as well as to the private creditor, on the 11th of February, 1873, of one dollar of 412 1-2 grains of standard silver for every dollar for which our obligations called. It was competent for Congress to have ordered the purchase and coinage of as many tons of silver as would enable the government and the private debtor to acquire the wherewithal to pay all outstanding debts. Had such coinage been made, the United States, so far as the silver coined belonged to the public, could have used it to redeem its interest-bearing bonds *and its notes which bore no interest*, and whose non-payment for so many years was so black a scandal to the public faith. Any one having these notes could with them procure the dollar pieces; and with the dollar pieces he was entitled to discharge, not only in the forum of law, but in that of the most scrupulous conscience, all debts contracted since 1837. There can be no doubt of this.

All these possibilities the Congress of that day, so far as it possessed the power, deliberately overthrew. I by no means intend to charge the sin of this act exclusively on Mr. Hooper in the House and Mr. Sherman in the Senate. These men were, indeed, the most active in pressing this measure to its consummation; but they were not the only men in Congress, nor were they a majority. If any man of sense, industry, and courage had examined this bill, exposed its tendencies, and urged its rejection, the appeal could scarcely have been ineffectually made. But no man appears to have done this.

Upon the final passage not even the ayes and nays were called. The shameful negligence and incapacity with which the minority, during the ten years before 1873, was accustomed to loiter through the sessions of Congress, are to blame for much of the vicious legislation which this minority failed to oppose and protest against. I make no defence for the acts of the majority; but I say that the minority, by its negligence, indolence, and systematic absence from the halls of legislation, "*paired off*" with some member of the majority, has disabled itself from putting on the men who perpetrated an unjust and unconstitutional piece of legislation the *whole* infamy of the measure. Part of it, at any rate, belongs to those whose duty it was to prevent such legislation, but who did not lift a finger in the effort.

By section 15 of this act the weight of the silver dollar was increased from 412 1-2 to 420 grains. By the act of 1853 the weight of the *half-dollar* had been declared to be 192 grains (instead of 206 1-4, or the half of the dollar piece); but this was done by a section which did not mention the weight of the silver *dollar*. Apparently the Congress of 1873, or the cunning men who were the patrons of this bill, imagined that it would be better to veil this contradiction under the obscurity of an unfamiliar term. Most men would have been startled if, *in the same section*, the weight of the dollar had been declared to be 420 grains and that of the half-dollar less than 200. Hence the artifice was adopted of saying that the half-dollar should be "12 grams (grammes) and one-half of a gram (gramme)." Now, this is a new word for American ears. In order to understand it we refer to the act of July 28, 1866, and find that Congress has legalized the "metric system," and defined the French *gramme*, or the Anglicised *gram*, to be equal to 15.432 grains *avoirdupois*, thus making the half-dollar of 1873 weigh 192.9 grains *avoirdupois*, while the *whole* dollar weighs 420 grains *troy*. I am curious to know if any one supposes that this mystification was unintentionally or innocently employed. At the very best it is pitiful and laborious

trifling; but it has the appearance of being something much worse. It was then declared that these silver coins ~~shall~~ should be a tender only in sums of $5 or less.

This act of 1873 has the merit of consistency. In all former currency bills the quality of being a legal tender, even for the smallest sums, had been confined to compositions of which either gold or silver formed a part, and to engraved paper. Now, for the first time, coins of copper, nickel, tin, and zinc were declared a legal tender. (§ 16.) It is true that they were so declared only for the purpose of small payments; but he must be dull indeed who fails to perceive that if Congress possesses the power of making these base metals a legal tender for a debt of 25 cents, or one-fourth of a dollar, it rests with the discretion of that body to make them a legal tender in sums of tens of thousands of dollars. Here, then, is the claim to have and exercise this astounding power. Is this claim well founded? We have seen that it is not. To repeat the demonstration would be worse than useless. Either the reasoning employed is unanswerable, in which case the conclusion announced cannot be denied, or it is illogical and the conclusion is a fallacy. But I am told that the power of Congress to make what it will a legal tender has been solemnly affirmed by the Supreme Court of the United States, following the decisions of the courts of many states, and that the question is no longer open.

I am aware of the decisions of the Supreme Court of the United States and of the courts of many of the states on this subject,[5] but I cannot accept the question as settled.

[5] In Hepburn v. Griswold, 8 Wall. 603, decided in 1870, the court, by 5 to 3 (Chase, Ch. J., and Nelson, Grier, Clifford, and Field, Associate Justices, in the affirmative, and Associate Justices Miller, Swayne, and Davis in the negative), held the act of February 26, 1862, to be *un*constitutional. In the case of Knox v. Lee, 12 Wall. 457, decided in 1871, the same act was held to be constitutional by 5 to 4 (Associate Justices Miller, Davis, Swayne, Strong, and Bradley in the affirmative, and Chase, Ch. J., and Associate Justices Nelson, Clifford, and Field in the negative). In the case of Metropolitan Bank v. Van Dyke, 27 N. Y. 400, decided in 1863, the same act was declared to be constitutional by Associate Justices Balcom, Wright, Emott, Martin, and Rosenkranz. Chief Justice Denio delivered an able dissenting opinion, in which Selden, associate justice, concurred.

Not to speak of the very even balance of authority in the two cases in the Supreme Court of the United States, no man of discernment can shut his eyes to the considerations which dictated the later decision. They were not juridical. Besides, all that was decided on the last occasion, all that obtained the sanction of a bare majority of the court—a majority which, until the retirement of Mr. Justice Grier and the appointment of Associate Justices Strong and Bradley, was of a different way of thinking—was that the blinding, bewildering, overmastering necessities of the war raging when that act was passed may have left to Congress no resource but to make rags a substitute for the precious metals, and not only to levy a forced loan to the government by means of the legal-tender act, but to confiscate the property of all existing creditors in the same interest; that *if* this necessity really existed it justified the act, and that whether it existed or not was a question for Congress alone, not to be reviewed by the judiciary.

This, and nothing but this, was the ground on which the *constitutionality* (?) of the act was upheld. In the opinion of four of the majority, the presence of an immeasurable and unmanageable danger was essential to give color to the plea of necessity. It is impossible to read the opinion of the court, delivered by Mr. Justice Strong, without being struck by this feature of it. It is true that Mr. Justice Bradley, concurring in the judgment, carried his views still further, and (12 Wall. 566–7) declined to confine the exercise of this enormous power to time of war. He held that Congress was the exclusive and absolute judge of the necessity of the measure and of the occasion for its exhibition, and if the reasoning of Chief Justice Marshall, in the case of McCulloch v. State of Maryland (4 Wheat. 416), be sound at all, it is difficult to deny the conclusions reached by the clear-sighted dialectician who deduced its inexorable consequences in 1871.

Without pausing to remark that in the first of the legal-tender cases decided in the United States Supreme Court there were five judges against and three in favor of the constitutionality of the act, and in the second five in favor of and four against it, we are forced to consider the reasons which governed each decision, and it cannot be a matter of indifference that the construction of the constitution contended for by those who upheld the act virtually abolished *all* constitutional restrictions upon the powers of Congress. Instead of our federal government being one of enumerated and defined powers, it becomes, under the rule declared by the majority of the court in 1871, one whose powers enlarge and multiply according to the opinion entertained by Congress of the necessity, or even the expediency, of such enlargement or multiplication at any particular crisis. It is one of the smallest objections to this reasoning that, according to it, the same thing may be within, or beyond, the powers of Congress, according to the opinion entertained by a majority concerning the gravity of the situation—that is, that the standard of constitutionalism may shift from week to week and year to year. I say this is one of the smallest objections to this mode of dealing with the matter; for, by the adoption of this test, the constitution itself, the meaning of which we are supposed to be investigating, is for all practical purposes thrown aside, and an absolute despotism is substituted for a carefully limited government. This result is plainly seen and mournfully insisted on by those of the Supreme Court who denied the constitutionality of the legal-tender act. In the case decided in 1870 it is stated as a controlling reason why the argument in favor of that act should be condemned. In the case decided in 1871 it is recognized and lamented as the appalling consequence of approving that argument.

If ours were in any true sense a popular government; if the people remembered that they were really the ultimate depositaries of all power, and that every one by them temporarily clothed with authority was strictly accountable to them for its abuse; and if, instead of an indolent, spiritless acquiescence in every act of usurpation, there were an intelligent challenge and vigilant scrutiny of every even doubtful act of administration, such events as the decisions

recorded in 12 Wallace and the enactment of February 12, 1873, would either be altogether impossible, or the agitation growing out of them would long ago have convulsed the land. It is deeply disgraceful to the intelligence of the American people that such a revolution as was *proclaimed* by the decision of 1871 was received without any apparent sense of its pernicious nature. We boast loudly enough of the diffusion at this day of intelligence through the whole community. It is claimed, moreover, that this diffusion is not effected at the expense of that superior knowledge which was once the possession of a few only. The assumption is that all of the many are now as well-informed, as intelligent, as competent to consider the most important subjects as the favored few of a past age. Yet, more than one hundred years ago, Burke, speaking of the inhabitants of the British colonies, who a short time after vindicated their independence and laid the foundation of the United States of America, remarked that so far-sighted were they, so ardently did they love liberty, and so cordially did they hate any encroachment on it, that they tested and condemned a proposed measure in advance of experience by the badness of the principle it embodied. "They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze," was the eloquent close of his eulogy on our forefathers. How have we fallen! This spirit, this intelligence, this statesmanlike prevision which were one hundred years ago predicable of the British colonists cannot in the last quarter of the nineteenth century be claimed by the people of the United States!

Will it be said that to have remonstrated indignantly against this judicial repeal of the limitations of our constitution would have been idle, and that Americans *are*, notwithstanding all that is said, fully alive to any practical encroachment upon their liberties, and ready to repel it? This cannot be said truly. In 1871 occurred this judicial overthrow of the constitution. In 1871–2 was introduced, and in 1872–3 was consummated, the act which plunged the country into the distress which for four years has been growing with a continually darkening progress. Now, what was the condition of things on February 1, 1873, and what was the operation of the act passed on the 12th of that month?

The whole country stood indebted to the public creditors, who were the holders of the interest-bearing bonds and of the United States notes which bore no interest, and never had borne any, in a large sum, exceeding $2,500,000,000. I take this sum in order to be within the mark; I do not wish to overstate the case. Besides this enormous public debt, the states, the cities, the counties, and individuals were largely indebted. In many cases—indeed, in a large majority of them, practically in all of them—the debts had been contracted when what was called a dollar was worth much less than 100 cents. In exchange for many of the obligations to pay $1,000, for example, the obligor had received, in lieu of $1,000, what was confessedly worth in the market at that time only $700 or less. It is not intended that this furnishes a reason why the obligation should be repudiated. Nothing is further from my thoughts. I am only describing the condition of things in the beginning of 1873. It has already been shown how enormously fortunate the holders of the *bonds* of the United States had been. Through the operation of similar causes *all creditors* were benefited by the appreciation of the paper which, when the debt was contracted, the debtor was compelled to treat as money. It was then accepted by the debtor as money. It had so nearly become equal in value to money—that is, to coin—that the creditor was an excessive gainer. I have no means of computing the amount of debts owing by the states, counties, cities, corporations, and individuals of the United States in the early part of 1873, besides the public debt of the whole country, which is understated at $2,500,000,000; but it was hardly less than $3,000,000,000, and, probably, was twice that sum. For some time past all undertakings had languished. All persons, whether creditors or debtors, were averse to investing money in any business enterprise, because of the shock to which all looked forward when specie payments should be resumed. It was assumed that nothing

could prevent that shock. It might be somewhat mitigated, but it must come, and all feared it would be disastrous. All men in business, and especially all who were at all in debt (which comprised a large majority of them), anticipated it with dread, and those who were not in business refrained from all enterprises, for fear of incurring a debt which might prove ruinous. For five years the contraction necessary to the resumption of specie payments had been going on. But it was almost universally felt that the end had not yet come—that it *would* come when specie was the currency; and with a shivering foreboding the community looked forward to that consummation.

Now, suppose that on February 12, 1873, instead of being dictated to by the act of that date, the people of the United States had been authoritatively addressed to the following effect: "You have, through war and revolution, been made subject to an enormous public debt. You are in nearly every state of the Union loaded with state debts, city debts, and county debts. Besides this, many of you are largely indebted as individuals, and are members of indebted corporations. All these debts imply an obligation to pay coined dollars, and one particular kind of coin has become so valuable, and therefore so hard to get, that to compel you to pay in *that* will add largely to all the burdens, public and private, of the whole people. Up to this time, for the last thirteen years, every matter that was subject to contingency has turned out to the advantage of the creditor and the disadvantage of the debtor. Recent events have given an advantage to the debtor. By the terms of his contract, even if most rigidly construed, he possesses the option of paying for each dollar of his debt a piece of coined standard silver weighing 412 1-2 grains. Such a payment satisfies the utmost demands of law, equity, and conscience. This piece of silver has now become, by the action of European governments and the discovery and working of large mines of silver in the United States, nearly as easy to get as the promise by the United States to pay a dollar which, nine years ago, was worth less than 40 cents. Hence the dreaded shock of resumption may be regarded as

a danger which is past. Resumption has come, and you are not hurt by it. Instead of estimating your public and private burdens by the standard of gold, you are by the plainest and most rigid principles of law and morals entitled to estimate them by the standard of silver. This at once lightens the public debt by nearly $200,000,000. It lightens your other burdens by a sum which may be variously reckoned at from $300,000,000 to $600,000,000. But, better than all, you are hereby relieved from that anxiety, paralysis, and stagnation which for more than five years have almost destroyed industry and enterprise."

No one, I imagine, can doubt that the people of the United States, hearing these tidings, examining into the truth of them, verifying them, and acting upon them, would have presented a very different picture from the same people during any one of the four last years, and contrasting as forcibly as can be with their actual condition. We know that none of these things were said. What was *done* must now be told.

Congress passed an act keeping the gold coinage at its old figure substantially, and making this gold coinage the only legal tender for debts exceeding $5. It increased the size and weight of the silver dollar by 7 1-2 grains of standard silver, raising it from 412 1-2 to 420 grains. The half-dollar, quarter-dollar, etc., were left practically unchanged, but from all these silver coins, including the dollar piece, was taken away (so far as Congress could take it away) the capacity for paying debts exceeding $5.

Practically this act proclaimed to the people of the United States on February 12, 1873: "You are legally bound to pay the public creditor $2,200,000,000 bearing interest and $400,000,000 bearing no interest, in silver coin. The silver dollar contains 412 1-2 grains of standard silver. Gold has become more valuable than its legal equivalent in silver. You naturally, therefore, will incline to pay the bondholder in silver. But it is hereby decreed that you shall pay him in gold. The law of your contract gave you the option of paying the debt in gold *or* silver coin. This option is taken from

you and given gratuitously to the public creditor. As to your other debts, the decree further is that, if they exceed $5, they too shall be paid in gold or its equivalent. They are not to be paid in silver. It is to no purpose that you urge that when the debt was incurred the understanding of both parties to it was that the creditor could demand, at most, only 412 1-2 grains of standard silver for each dollar of it. And it is equally idle for you to say that the debt was created by borrowing, and that what you received as money was not worth, at the time you got it, 60 cents in the dollar. You shall pay every dollar of this debt, not merely in dollars of 420 grains of standard silver, but in gold dollars of 25 8-10 grains of standard gold, which is more valuable by nearly 10 per cent. As matters stood yesterday, the problem of specie resumption appeared to be in the way of being solved without a shock, and henceforward all anxiety on that account might be dismissed. You might have embarked with new heart and hope in the various enterprises which engage capital and industry. You might have had all the advantage of the encouragement and confidence due to the successful accomplishment of an arduous task—to a return to a specie standard. All this is ended. You are still to be affrighted and deterred by the dim spectre of the consequences of a resumption in gold only. Resumption is not only deferred, but is made more difficult. More weight is put on you, and at the same time you are made weaker, so that you will be the less able to bear it." All these consequences were directly decreed by the act of February 12, 1873. I challenge contradiction.

Now, let it be imagined that any malevolent tyrant, exercising absolute power over the fortunes of his subjects, should have inflicted on them burdens like these. Would not the world have broken out in execration? Sure I am that no despot in any country where the people have anything to lose could have perpetrated such an outrage and have been so tamely submitted to. Yet we prate about our intelligence, our public spirit, our love of liberty, our resistance to oppression, and our popular sovereignty — which last phrase, if it

means anything, signifies that those who are entrusted with administration for the purpose of carrying on the government are accountable for their stewardship to the people who are their masters. I do not believe that such an atrocious outrage could have been accomplished fifty years ago without making it strictly necessary for every man who understandingly contributed to it to hide himself from the sober indignation of a pillaged people. I believe that at this day, while the reality of the outrage cannot be denied, not one man in a hundred is aware of the crime, or is indignant at the malefactors. This act of February 12, 1873,[6] as we have seen, followed closely on the last legal-tender decision, and there can be no doubt that, so far as its unconstitutionality went, it was its lineal offspring. But every lawyer knows that the latest legal-tender decision was based on the opinion of Chief Justice Marshall in McCulloch v. State of Maryland (4 Wheat. 316), and Mr. Justice Bradley was right, logically, in deducing from that opinion conclusions in advance of those announced by his more cautious associates. There was something manly in his intrepid logic, and if the American people cared one fig for what our forefathers regarded as their most inestimable possession, it could hardly fail to take the alarm when thus distinctly admonished that the most authoritative legal tribunal in the land had proclaimed principles conferring upon the United States Congress the omnipotence so often claimed for the British Parliament, and reducing to the nothingness of a tinkling

[6] It will not do to say that this act of February 12, 1873, was passed hastily, and that it was a surprise upon the Democrats. It was discussed and substantially agreed on in the session of 1871–2. There was no debate over its provisions in 1872–3 that deserves the name, and (what I very much regret), the *Congressional Globe* does not show us the vote in either House on the final passage of the bill. It was under the especial patronage of Mr. Hooper, of Massachusetts, in the House of Representatives, and of Mr. Sherman in the Senate, but beyond this the records of that session disclose nothing of importance. The yeas and nays were not called on it once, and its far-reaching and pestilent consequences appear not to have been suspected. Mr. Casserly, of California, did, indeed, spend some time on an amendment on the subject of the devices of the several coins! He was solicitous to prevent the omission from some of them of the effigies of the *eagle!*

cymbal those constitutional limitations in which we had been accustomed to place our trust. It is notorious that the American people have given no proof that they scented the danger. Either they did not perceive the menace or they were careless and indifferent to the safety of what was threatened. If they were engrossingly occupied in the pursuit of higher things (if, indeed, higher aims than the care of civil liberty and the preservation of constitutional government *can* engage the attention of mankind), this apathy would be less disgraceful.

I have heard no answer to this characterization of the decision and the statute quoted. I have heard, indeed, a bold declaration that they are both in the highest degree constitutional in point of law and wise in point of statesmanship; but the favorite line of defence is to denounce all who are opposed to either as inflationists and repudiators.

Now, to whatever the *decision* led the way, its direct effect was to relieve the debtor, though it was made the occasion of a *statute* which well nigh crushed him by its injustice and unconstitutionality. I will not address any argument to those who can think the act of February 12, 1873, a *debitum justitiæ*, or a measure of statesmanlike wisdom. I am altogether engrossed with the question of the power of Congress, upon the presentation of any conceivable temptation, or the suggestion of any possible pretext, to perpetrate such a spoliation upon the people; and I have said that I am unable, if I accept the reasoning of Chief Justice Marshall, to deny the conclusions of Mr. Justice Bradley. Either the constitution is a rope of sand, or the reasoning of Chief Justice Marshall is unsound; and I cannot, as a lawyer, hesitate in my choice of the alternative. Of course, in saying this, I simply signify my adhesion to the many great jurists who, at the time and afterwards, proclaimed their dissent from the logic by which Chief Justice Marshall satisfied himself that Congress had power to charter a national bank. Mr. Justice Bradley has lately demonstrated that the same logic will suffice to clothe that body with whatever powers and prerogatives it may covet and declare to be necessary—itself being the sole and ultimate judge of the necessity.

The justices of the Supreme Court who, in 8 Wallace, declared the legal-tender act unconstitutional, and those who, in 12 Wallace, unavailingly protested against the reversal of that decision, expressed their confident belief that it would have been impossible that either Marshall or Story could have decided that Congress possessed the power to make engraved paper the equivalent of coined gold and silver. Such a conclusion was shocking to their sensibilities, and they deprecated and resisted it with eloquence and with pathos. They found, of course, many *dicta* of those eminent men which were wholly irreconcilable with the idea that a contrivance for borrowing money could, by any *fiat* known to the American jurist, be made money itself, and they demonstrated that both Marshall and Story must have revolted if *suddenly* asked to sanction the act of February 25, 1862. But they fail to show that the reasoning in 4 Wheat. 316 does not contain the "seminal principle of mischief;" and to my mind it is unquestionable that either this reasoning must be condemned as unsound, or we must accept the conclusion that there are no limits to the discretion of Congress—that all constitutional barriers are swept away, and that, with a very trifling modification of the terms, but none whatever of the spirit, we may adopt the maxim of the civil law, "*quod principi placuit legis habet vigorem.*"

It is true that no decision of the Supreme Court sanctions the act of 1873. That act was passed in time of profound peace, and no urgent demand, growing out of a crisis in our affairs, arose for its enactment. It would be very difficult to assign anything like *necessity*—something that knows no law and is incapable of restraint or guidance—for the donation to the bondholders and the spoliation of the people which was effected by that statute, and so that law stands condemned, upon all the rules up to this time declared by the court of last resort (except those indicated by Mr. Justice Bradley), as a usurpation of power. But we must not deceive ourselves. The reasoning employed by Chief Justice Marshall (in 4 Wheat. 316) is of extreme and most dangerous flexibility. There is no possibility for constitutional govern-

ment except in strict construction. What is called "*liberal* construction" is, in the worst sense of the term, *destructive*. It tears into shreds the charter the meaning of which is in question. It is the universal solvent. Bars of steel and walls of adamant melt like wax when it is applied. One is tempted, except that the matter is too grave for jesting, to quote the lines of the satirist on a kindred subject,

> "A liberal conscience is all one,
> And signifies the same as—*none!*"

when asked to tolerate the enlargement of a power given, or the arrogation of a power withheld, by invoking what is called a "*liberal construction*."

We may sympathize with the final minority of the Supreme Court of the United States in rejoicing that neither Marshall nor Story *did* ever sanction such a palpable violation of the letter and spirit of the constitution as the act of February 25, 1862, perpetrated; but, for one, I am glad that they never were tempted to do such a thing. No one honors the memory of Marshall more than I do. His ability, his mastery of legal principles, and his clear logic have always excited my admiration. One of the earliest and most cherished recollections of my boyhood is the sight of that great jurist presiding over the court to which he gave such lustre; and for stainlessness I have always ranked him with Washington. But both Washington and Marshall were only men; and it can hardly be doubted that the latter felt the ascendant of the genius of Hamilton. He accepted the opinion of that ablest man of the Federal party, that the Constitution permitted the creation of a bank, and on the bench he could only justify this opinion by reasoning which has since proved sufficient to warrant a more dangerous usurpation. Marshall might have hesitated to follow to its inexorable result the reasoning employed to defend the bank; but, besides that we have no assurance that he would have done this, we hope that he would in that case have pronounced the reasoning faulty from the beginning. It is not candid to adhere to a course of reasoning for certain purposes and to repudiate it for others. In a line directed towards a distant object, an

error in the aim, almost imperceptible in the beginning, will be measured by an enormous divergence when a large portion of space is traversed. But no geometrician would infer that the deviation was due only to the distance passed, or that the line was correct at any point of its course. He would know that the first step to be taken for avoiding error, and the ruin which waits on it, was to go back to the beginning and readjust the first *inch* of the direction. So here, when the premises of a syllogysm lead us to an absurd conclusion, we know that a fallacy lies concealed in them, and proceed to exclude it. When a subtly-constructed argument conducts us first to an unexpected, then, by following it somewhat further, to a startling, and lastly to a monstrous, consequence, no man in his senses accepts the first and rejects the last. All are by the conclusion demonstrated to be founded on fallacies, detected or undetected, and the reasoning which led to that which perhaps flattered our prejudices stands condemned because we see that it conducts equally to that which overthrows all settled judgment. The fallacy must be eliminated from the argument before any trust can be placed in any of the deductions from it, whether immediate or remote.

In the meantime the following seem to be the measures of practical statesmanship which the conjuncture demands. First, the restoration, by the repeal of the act of 1873, of the dollar of 412 1-2 grains of standard silver to its capacity for paying a dollar of each debt contracted since 1837 and made payable *in coin*, by whomsoever to whomsoever. If before or since that day any contract has been made to pay *gold coin*, let that promise be fulfilled according to its tenor. In respect of the United States, let all bonds or promises to pay money by *it* issued since February 12, 1873, be redeemable in gold coin. Let the coinage of silver dollars of 412 1-2 grains, and of half and quarter-dollars of proportionate weight, be urged with all diligence at the national mints; and let all the outstanding legal-tender notes and fractional currency of the United States be paid out of the first money thus coined. When all these obligations are paid, *but not before*, let the bonds of the United States, issued before Feb-

ruary 12, 1873, be paid, as far as possible, in the same silver coin; and let no such bond be paid at any time in gold coin, unless, peradventure, gold coin should become, in the interests of the debtor, a medium preferable to silver in payment of debt (as was the case in 1853). Finally, in all future issues of bonds of the United States, let the medium of payment be declared in the bond; failing this, let the choice of the medium belong, as before, irrevocably to the debtor.

THOMAS T. GANTT.

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